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JUDGE WILLIAMS

8 UNITED STATES BANKRUPTCY COURT  
9 EASTERN DISTRICT OF WASHINGTON

10 THE CATHOLIC BISHOP OF  
11 SPOKANE a/k/a THE CATHOLIC  
12 DIOCESE OF SPOKANE,

Debtor.

NO. 04-08822-PCW11  
Chapter 11

13 COMMITTEE OF TORT LITIGANTS,

14 Plaintiff,

Adversary No. 05-80038-PCW

15 Vs.

16 THE CATHOLIC DIOCESE OF  
17 SPOKANE, et al.,

Defendants.

ST. AUGUSTINE PARISH'S  
OPPOSITION TO  
SUMMARY JUDGMENT

19 St. Augustine Parish and its Parishioners ("St. Augustine"), in opposition to the Tort  
20 Litigant Committee's (the "Committee") Motion for Summary Judgment (Docket Nos. 63-67,  
21 72), submits the following memorandum of law. This memorandum incorporates and is  
22 supported by the Affidavit of Fr. Robert McNeese, the Declaration of Msgr. R. Pearson, the  
23 Affidavit of William Ogle, Parishioner, and Defendants' Omnibus Statement of Facts (LR  
24 7056). St. Augustine also adopts and incorporates those Affidavits filed by other  
25 Defendants opposing Plaintiff's Motion.  
26

ST. AUGUSTINE PARISH'S OPPOSITION  
TO SUMMARY JUDGMENT - 1

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I.

RELIEF REQUESTED

The Committee's attempt to deny St. Augustine its ownership interest in real property that St. Augustine paid for, improved, and uses in fulfillment of its religious tenets must be rejected. The undisputed evidence demonstrates that:

1. Neither the Committee, its members, nor the Debtor have any beneficial interest in the real property belonging to St. Augustine;
2. Neither the Committee, its members, nor the Debtor have a legal basis to justify the taking of real property from St. Augustine, a non-debtor; and
3. St. Augustine's equitable and beneficial ownership interest in the real property is clearly established by non-bankruptcy law.

As a matter of both law and fact, the Committee's Motion for Summary Judgment/Declaratory Relief seeking to deprive St. Augustine of fundamental property rights and religious freedoms must be denied.

II.

PROCEDURAL HISTORY

A. The Bankruptcy

A voluntary petition under Chapter 11 of the Bankruptcy Code was filed by the Catholic Diocese of Spokane, a corporation sole ("Debtor"), on December 6, 2004 (Petition Date). The Bankruptcy Court entered the Order for Relief, adjudicating the Diocese a Chapter 11 Debtor. Since that date, the Debtor has acted as the Debtor-in-Possession pursuant to 11 USC 1108. The Debtor duly filed and subsequently amended its Schedules and Statement of Financial Affairs. (See Main Case Docket Nos. 19, 41-42)

Within its Statement of Financial Affairs, the Debtor describes certain real property to which it holds "bare legal title." The Statement of Affairs explains that equitable/beneficial title to such real property is held by other entities, including St. Augustine. This description is accurate concerning the true ownership of the real property and supported by both facts and applicable law. Neither the Debtor nor St. Augustine disputes this particular trust relationship.

1 **B. Appointment of Creditors Committee**

2 On February 2, 2005, the Court entered an Order duly approving the appointment of  
3 the Committee. (Main Case Docket No. 206) The Committee consists of individuals who  
4 filed complaints against the Diocese in the Superior Court of the County of Spokane, State  
5 of Washington. Neither the Committee nor its members have asserted a claim in State  
6 Court against St. Augustine or identified any legal relationship with St. Augustine.

7 The legal standing of the Committee to seek declaratory relief against non-debtors in  
8 this manner is disputed and the subject of a pending motion to dismiss. (See Section II.F.)

9 **C. The Adversary**

10 On February 4, 2005, the Committee filed a three count Complaint ("Complaint") in  
11 this adversary proceeding ("Adversary Proceeding"), specifically:

- 12 • FIRST CAUSE OF ACTION  
(Declaratory Relief: The Disputed Real Property)
- 13 • SECOND CAUSE OF ACTION  
(Declaratory Relief: the Disputed Personal Property)
- 14 • THIRD CAUSE OF ACTION  
(Declaratory relief: Substantive Consolidation)  
(Docket No. 1, Complaint)

15 Although property is allegedly "disputed," the Committee does not have or assert a  
16 legal claim to or legal interest in the real or personal property. (See Complaint, pp. 13-15.)

17 The relief sought by the Committee is drafted as equitable, although it is clearly of  
18 the nature and effect of relief determining property rights of non-debtors. Specifically,

- 19 1. Declaring that the Disputed Real Property is property of the estate under 11  
20 U.S.C. § 541(a)(1) as of December 6, 2004;
- 21 2. Declaring that the Disputed Personal Property is property of the estate under  
22 11 U.S.C. § 541(a)(1) as of December 6, 2004;

1           3.       Ordering the Debtor to amend its Amended Statement of Financial Affairs and  
2 its Amended Schedules of Assets and Liabilities to reflect that the Disputed Real Property  
3 and the Disputed Personal Property are all property of the estate;

4           4.       Ordering substantive consolidation, nunc pro tunc, of the Debtor's bankruptcy  
5 estate with the [Diocese-Related Entities] effective as of December 6, 2004.

6           (Adv Complaint, p. 15)

7           By way of the Complaint, the Committee seeks to determine the property rights and  
8 interests of not only St. Augustine, but of 82 non-debtors. The Complaint seeks to deprive  
9 those non-debtors of their instrumentalities used in religious worship, faithful exercise of its  
10 mission, activities, and ministries.

11 **D.     Motion for Avoidance Powers**

12           On February 7, 2004, the Committee filed a motion in the main case seeking  
13 avoidance powers. (Main Case Docket Nos. 223-224) The motion was heard on May 2,  
14 2005. The court continued hearing on this matter for an indefinite period (approximately 5  
15 to 6 months) with any counsel being able to renote this matter on 20 days notice.  
(Main Case Docket No. 393)

16 **E.     Motion for Summary Judgment**

17           The Committee filed the present motion for summary judgment ("Motion") on April  
18 17, 2005. (Adv. Docket No. 63)

19           The Motion seeks specific relief defining title and ownership of at least 22 separate  
20 parcels of real property which belong to at least 22 different and distinct Defendants.  
21 Although the Committee's Motion indicates that they have restricted summary judgment to  
22 their first cause of action, the Memorandum aggressively seeks a ruling on their third cause  
23 of action by way of an "alter ego" argument.

24           The Committee's Motion attempts to "lump" St. Augustine's real property with other  
25 Defendants' real property interests, dealing with all parcels of property collectively,  
26 including all improvements and fixtures. However, each parcel of real property is a  
separate parcel of property, with separate and distinct ownership interest, and separate

1 factual circumstances surrounding each parcel's acquisition, improvement, maintenance,  
2 and use. The committee's standardized factual scenario is inapplicable and not an  
3 appropriate basis for declaratory relief against St. Augustine.

4 **F. Motion to Dismiss Adversary Proceeding**

5 On May 2, 2005, the Parish Defendants filed a motion under FRBP 7012 seeking to  
6 dismiss this Adversary Proceeding on the following grounds:

7 The Committee's Complaint should be dismissed on either of two (2)  
8 separate grounds.

9 1. Nothing contained within the express language of Section  
10 521(1) or 541(a) clearly, explicitly, or unambiguously confers standing to a  
creditors committee to file suit against non-debtors to define a non-debtor's  
property rights.

11 2. The Bankruptcy Court and Federal District Court lack subject  
12 matter jurisdiction over the claims alleged in the Committee's Complaint  
13 because there is no case or controversy between the Committee and the  
Parishes within the meaning of the Declaratory Judgment Act and Article III of  
the U.S. Constitution.

14 (Docket Nos. 99-100)

15 This motion is set to be heard on June 27, 2005.

17 **III.**

18 **NON-CORE PROCEEDING**

19 The Committee asserts in its Complaint that this is a "core proceeding" under 28  
20 USC § 157(b) and 1334(b). The Parishes, based upon the declaratory nature of the relief  
21 sought in the Complaint, deny that this is a core proceeding. This action exclusively seeks  
22 declaratory relief against over 80 non-debtor defendants to determine the property rights of  
23 separate legal entities. The Complaint does not present a federal question nor is there  
diversity between the litigants.

24 The present adversary action has the effect of a defacto quiet title action as to non-  
25 debtor defendants. As such, it could have easily been brought in state Superior Court  
26 pursuant to RCW 7.28.010 et seq., regardless of whether the Debtor was in bankruptcy.

1 For purposes of this Adversary Proceeding, St. Augustine does not consent to entry  
2 of Findings of Fact and Conclusions of Law and does not waive defenses related to  
3 Plaintiff's standing and failure to state a claim. (See Docket Nos. 88, 99-100.)

#### 4 IV.

#### 5 STATEMENT OF FACTS

6 St. Augustine Parish was founded with 75 Catholic families and the first church was  
7 dedicated in 1914. (Dec. R. Pearson, ¶ 3) This church served the needs of the Parish, in  
8 many ways, including a Catholic grade school, together with living quarters for the  
9 Franciscan sisters who came from Wisconsin that same year to run the school with an  
10 original enrollment of 40 students.

11 Under Canon Law, St. Augustine is a separate and distinct legal entity known as a  
12 juridic person. [Canons §113-115, §515] Under Civil Law, St. Augustine is an  
13 unincorporated association. (Committee's Statement of Undisputed Fact No. 23) St.  
14 Augustine now consists of 698 registered member households, approximately 2500  
individuals. (Aff. R. McNeese ¶ 11)

15 The land upon which St. Augustine Parish sits has been used by the Christian  
16 faithful for over 90 years. The acquisition of the land occurred through a variety of transfers  
17 of interests over several years. (Dec. R. Pearson, ¶¶ 4-6)

18 In February, 1915, the Corporation of the Catholic Bishop of Nesqually acquired  
19 legal title to Lots 10 through 17 of Block 6, of Cannon Hill Park in Spokane. (Aff. R.  
20 McNeese, ¶ 5, Ex. "A") In the covenant between the Cannon Hill Company and the  
Catholic Bishop of Nesqually the following restriction was clearly placed on the deed:

21 The rights, interests and estate which the party herein takes under this deed  
22 shall be subject to the following conditions:

23 (b) No apartment house, store or business structure of any kind shall  
24 be erected or maintained on said lands but/ permission is hereby given to  
erect and maintain a church and school on above described property.

25 The above conditions and covenants shall run with the land and  
26 compliance with the same may be enforced by injunction.

(Aff. R. McNeese, ¶ 5, Ex. "A")

1 The original purchase price was \$12,000. The Parish property was subsequently  
2 transferred by way of quit claim deed from the Bishop of Nesqually to the Catholic Bishop  
3 of Spokane, a corporation sole, referencing consideration of \$10.00.

4 In January, 1920, legal title to lots 1 and 2 of block 7 of Cannon Hill Park Addition of  
5 Spokane was acquired by St. Augustine for and in consideration of \$8,000.00. In 1930,  
6 legal title to lots 4-9, 18-23, and the west 125' of lots 1-3 and 24, 25 of Block 6 of Cannon  
7 Hill Park in Spokane was acquired by St. Augustine, for and in consideration of \$1,870.00.  
8 All of the money used for these purchase came from donations of the Christian faithful of  
9 the Cannon Hill community, which would eventually comprise St. Augustine Parish. (Aff. R.  
McNeese ¶¶ 4-7, Ex. A; Aff. W. Ogle, ¶ 2.)

10 A campaign drive was conducted by Parishioners for a new church building during  
11 the period of 1948-1950. This drive was conducted by Parishioners, seeking gifts and  
12 donations by Parishioners, for a new Parish church owned by Parishioners. (Dec. Ogle, ¶  
3-5)

13 In addition to money raised through donations of Parishioners, St. Augustine  
14 borrowed in 1949 the sum of \$200,000 from a public lender known as McMahon & Hoban.  
15 St. Augustine also borrowed an additional sum of \$100,000 from the same company in  
16 1950. (Aff. R. McNeese ¶ 8, Ex. B)

17 In 1944, Fabian Smith and Edith Smith gave Lots 20-24, Block 14 of the South Side  
18 Cable Addition of Spokane to St. Augustine. Title was placed in the name of the Catholic  
19 Bishop of Spokane, a corporation sole, under the laws of the state of Washington. (Dec. R.  
Pearson, ¶ 5, Ex. B)

20 In 1989, then Pastor of St. Augustine, along with Parish Council, negotiated the sale  
21 of this property to the City of Spokane. The proceeds generated from the sale of this land  
22 were used by the Parish to pay debt. (Dec. R. Pearson, ¶¶ 5-6)

23 Since its inception as a Parish, St. Augustine and its members have been  
24 responsible for the improvements, building projects, fees, insurance, and maintenance  
25 associated with the real property. The money used to fund these activities was derived from  
26 Parishioners. (Aff. R. McNeese, ¶¶ 9-13; Dec. W. Ogle, ¶¶ 3-7)



1 As a Parish, St. Augustine has its own tax identification number, hires and fires  
2 employees, has its own bank accounts, maintains its own financial records, and contracts  
3 directly with numerous vendors. (Aff. R. McNeese, ¶¶ 14-16)

4 The funding mechanism for St. Augustine's operations is its Parishioners. In  
5 addition to weekly tithes, St. Augustine benefits from specific gifts, bequests, and donations  
6 given solely for the benefit and use of St. Augustine, including improvements and  
7 maintenance of real property. (Aff. R. McNeese, ¶ 19)

8 Contrary to the Committee's conclusions, the facts demonstrate St. Augustine is its  
9 own legal entity and is the true owner of all equitable and beneficial interest of the real  
10 property identified as "St. Augustine" by the Committee.

## 11 V.

### 12 STANDARDS OF REVIEW

#### 13 A. Declaratory Judgment Standard.

14 The Committee glosses over the fact that the relief it seeks is entirely declaratory in  
15 nature. A declaratory judgment action is ripe for adjudication only where an "actual  
16 controversy" exists. Orix Credit Alliance, Inc. v. Wolfe, 212 F.3d 891, 896 (5<sup>th</sup> Cir. 2000).  
17 "As a general rule, an actual controversy exists where 'a substantial controversy of  
18 sufficient immediacy and reality [exists] between parties having adverse legal interests.'"  
19 Id., citing Middle South Energy, Inc. v. City of New Orleans, 800 F.2d 488, 490 (5<sup>th</sup> Cir.  
20 1986).

21 Although some Bankruptcy Courts have entertained declaratory judgment actions  
22 filed by trustees when the ownership interest of an asset was in dispute which the trustee  
23 asserted was property of the estate on the petition date, the present case is not advanced  
24 by a trustee or Debtor-in-Possession. See In re Challenge Air Int'l. Inc., 952 F.2d 384 (11<sup>th</sup>  
25 Cir. 1992); In re Taylor & Campaigne, Inc., 157 B.R. 493 (Bankr. M.D. Fla. 1993); Bottom v.  
26 Bottom, 176 B.R. 950 (Bankr. N.D. Fla. 1994); In re Ocean Beach Club, Inc., 79 B.R. 505  
(Bankr. S.D. Fla. 1987).

27 There is no legal relationship between St. Augustine, the Committee, or any  
28 Committee members. Furthermore, there is no legal dispute between St. Augustine and



1 the Debtor regarding the ownership interests in real property or trust relationship between  
2 the Debtor and St. Augustine. It is correctly described and defined in the Debtor's  
3 Statement of Affairs in accordance with the relationship between the parties as established  
4 by Canon Law and Civil Law. As such, no actual controversy between parties with adverse  
5 legal interests exists.

6 **B. Summary Judgment Standard.**

7 The party moving for summary judgment has the burden to show that he is entitled  
8 to judgment under established principles; and if he does not discharge that burden, he is  
9 not entitled to judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 156, 26, L.Ed.2d 142,  
10 90 S. Ct. 1598 (1970).

11 In determining whether there are any genuine issues of material fact, the Court must  
12 view the evidence in the light most favorable to the nonmoving party. Summers v. A.  
13 Teichert & Son, Inc., 127 F.3d 1150, 1152 (9<sup>th</sup> Cir. 1997). The party opposing summary  
14 judgment to survive the motion need only present evidence from which a jury might return a  
15 verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial. Id. at  
16 1039, citing Anderson v. Liberty Lobby, Inc.

17 The Committee has failed to produce any evidence to support its contention that the  
18 beneficial and equitable ownership of the real property does not belong to St. Augustine.

19 However, St. Augustine has not only produced reasonable evidence as to a material  
20 issue of fact as to its ownership interest in the real property, it has also produced  
21 overwhelming evidence that St. Augustine is the true owner of the real property in question.  
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VI.  
LEGAL ANALYSIS PREVENTING DECLARATORY RELIEF  
CONCERNING REAL PROPERTY OWNERSHIP

**A. Whether Applying Civil Law Or Canon Law, St. Augustine Parish Is A Separate And Distinct Legal Entity.**

The Committee has conceded that Parishes are unincorporated associations. (See, Committee Statement of Undisputed Fact No. 23) The Committee's acknowledgment of St. Augustine's status as a separate legal entity from the Debtor is consistent with both Civil and Canon Law.

**1. Washington Law Recognizes St. Augustine As A Legal Entity.**

The Parish, as an unincorporated association, is a separate legal entity under Washington law. A Parish consists of its Christian faithful. (Canon 515(1)) The Christian faithful ("Parishioners") of each Parish are the residents of their local community. They are residents of cities, towns, and counties within Eastern Washington, in some cases they are members of sovereign Indian tribes. The Parishioners are the epitome of a voluntary group pursuing a common purpose. In the case of each parish, the common purpose is the fulfillment of their religious tenets.

An "unincorporated association" is defined as "[a] [v]oluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting common enterprise or prosecuting common objective. An organization composed of a body of persons united with a charter for the prosecution of a common enterprise." *Black's Law Dictionary*, 1531 (6<sup>th</sup> 1991). This is a broad definition, and Washington has recognized that "associations vary in their nature." *Riss v. Angel*, 131 Wn.2d 612, 635 (1997). Washington's case law recognizes a variety of forms of unincorporated associations, including groups of individuals of a particular religion or creed. See *Bacon v. Gardner*, 38 Wn.2d 299 (1951), *Church of Christ v. Carder*, 105 Wn.2d 204 (1986).

Unincorporated associations clearly have the ability to hold the equitable interests of a trust and defend that interest in court. *Leslie v. Midgate Center, Inc.*, 72 Wn.2d 977

1 (1967). Washington has repeatedly acknowledged the legal capacity of unincorporated  
2 associations to be parties to lawsuits. Bacon v. Gardner, 38 Wn.2d 299, 304 (1951); State  
3 v. Bothell, 89 Wn.2d 862, 866 (1978); see also Church of Christ v. Carder, 105 Wn.2d 204,  
4 206 (1986); Riss, 131 Wn.2d 612 (1997). By statute, unincorporated associations have the  
5 capacity to appear and represent their interests in declaratory judgment actions. RCW §§  
6 7.24.110 - .130 (West 2005). It is well settled law that unincorporated associations have  
7 the ability to represent the interests of their members in legal actions. See, State v. Bothell,  
8 89 Wn.2d at 866.

9 It is important to note that not a single case quoted by the Committee in support of  
10 its assertion that each Parish is not a legal entity is from the state of Washington.  
11 Bankruptcy Rule 7017 incorporates Rule 17(b), Fed. R. Civ. P., as follows:

12 The capacity of an individual, other than one acting in a representative  
13 capacity, to sue or be sued shall be determined by the law of the individual's  
14 domicile. The capacity of a corporation to sue or be sued shall be determined  
15 by the law under which it was organized. In all other cases capacity to sue or  
16 be sued shall be determined by the law of the state in which the district court  
17 is held . . . .

18 As a matter of law, unincorporated associations can be sued under Washington law.  
19 The various cases cited by the Committee have no precedential value here in Washington.  
20 The Committee's argument that St. Augustine does not have a legal existence separate  
21 from the Diocese fails as a matter of law. It is also inconsistent with Committee's  
22 Statement of Undisputed Fact No. 23.

## 2. St. Augustine Is A Separate Legal Entity Under Canon Law.

23 The Law of the Roman Catholic Church ("Church") has been in existence since the  
24 first century. Presently, the Church is governed by the 1983 Code of Canon Law. To the  
25 extent the resolution of this matter requires a determination of the relationship between the  
26 Debtor and St. Augustine in their methods of governance, interaction or management,  
compulsory deference is required to the provisions of the Code of the Canon Law which  
govern these religious organizations under applicable law. The Supreme Court, when  
faced with issues involving the Roman Catholic Church, has stated:

1 In the absence of fraud, collusion or arbitrariness, the decisions of proper  
2 church tribunals on matters purely ecclesiastical, although affecting civil  
3 rights, are accepted in litigation before the secular courts as conclusive,  
4 because the parties in interest made them so by contract or otherwise. Under  
5 like circumstances, effect is given in the courts to the determination of the  
6 judiciary bodies established by clubs and civil associations.

7 Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16-17, \_\_\_ S.Ct. \_\_\_, 74 L.Ed.131,  
8 137 (1929) (citing Watson v. Jones, 13 WALL 676, 20 L.Ed. 666 (\_\_\_)).

9 This legal principle has been clearly adopted by the Washington State Supreme  
10 Court, when addressing real property interests involving a hierarchal church. See,  
11 Wilkerson v. Rector, etc., St. Luke Parish, 176 Wash. 377 (1934); See also, Church of  
12 Christ v. Carder, 105 Wn.2d 204 (1986); Southside Tabernacle v. Church of God, 32 Wash.  
13 App. 814 (1982) (All applying the compulsory deference rule established in Watson to  
14 disputes involving church property.)

15 In this case, the identity of the Parish, the Parishioners, the Debtor, and their  
16 relationship to their property rights are defined within Canon Law. These relationships, are  
17 "purely ecclesiastical, though affecting civil rights, [and] are [to be] accepted in litigation  
18 before secular courts as conclusive[.]" Gonzalez, 280 U.S. at 16, \_\_\_ S.Ct. at \_\_\_, 74 L.Ed.  
19 at 137.

20 Within the Church, besides physical persons, there are also juridic persons, that is,  
21 subjects in Canon Law of obligations and rights which correspond to their nature. (Canon  
22 113(2)) A juridic person is an artificial person distinct from all natural persons or material  
23 goods. Like a civil law corporation, it is a legal entity which can and must be conceived  
24 apart from the natural persons who constitute it, administer it, or for whose benefit it exists.  
25 See L. Chiappetta, Il Codice d: Diritto Cononico: Comento Giuridco-Pastorale, 2<sup>nd</sup> ed.  
26 (Rome: Dehoniane, 1996) 1:169; Robert Kennedy, New Commentary on the Code of  
Canon Law (Paulist Press 2000).

Canon Law provides that:

A parish is a certain community of the Christian faithful stably constituted in a  
particular church, whose pastoral care is entrusted to a pastor as its proper  
pastor under the authority of a diocesan bishop. (Canon 515(1))

1 Canon 515(3) states:

2 A legitimately erected parish possesses juridic personality by the law itself.  
3 (Canon 515(3))

4 In this case, there is no dispute that St. Augustine is a legitimately erected Parish  
5 and a juridic person under Canon Law.

6 Canon Law is clear that property acquired by a Parish belongs to the Parish.  
7 Specifically, Canon 1256 states:

8 Under the supreme authority of the Roman Pontiff, ownership of goods  
9 belongs to that juridic person which has acquired them legitimately. (Canon §  
10 1256)

11 Since its inception, the Christian faithful themselves, which constitute the Parish,  
12 have acquired both real and personal property which is used by the Christian faithful in their  
13 fulfillment of their religious tenets. Under Canon Law, the property was acquired by, used  
14 by, improved, maintained, and owned by each Parish independently. (Canons 1257-1272)  
15 The juridic person (Parish) may not be deprived of its property without consent and  
16 approval. (See Canons 1281–1288 and 1291-1295)

### 17 **3. Committee Waived Argument on Individual Parish Standing.**

18 The Committee's decision to name and sue St. Augustine and 81 other Parishes  
19 individually is evidence of the separate legal identity of each parish. Furthermore, the  
20 Committee admits that St. Augustine is a separate unincorporated association in its  
21 Statement of undisputed Facts. (CSF No. 23) The doctrine of judicial estoppel prevents a  
22 party from taking divergent positions in different legal proceedings. Wagner v. Proff  
23 Engineers in California Court, 354 F.3d 1036, 1044 (9<sup>th</sup> Cir. 2004).

24 In addition, the request for relief in the Complaint seeks substantive consolidation of  
25 St. Augustine with the Debtor. Substantive consolidation in bankruptcy terms is the  
26 consolidation of a non-debtor entity with a separate debtor entity. (See Alexander, 229  
F.3d 750 (9<sup>th</sup> Cir. 2000)) As such, the Committee has already recognized the legal identity  
of St. Augustine is separate and apart from the Debtor. The Committee should be  
estopped from taking a contrary position for purposes of its Motion.

1           **4.       Judicial Estoppel Does Not Apply to St. Augustine.**

2           St. Augustine does not dispute the definition of judicial estoppel submitted by the  
3 Committee which is designed to prevent a party from taking divergent positions in different  
4 legal proceedings. See the Committee's Memorandum at p. 18, citing Wagner v. Prof.  
5 Engineers in California Gov't, 354 F.3d 1036, 1044 (9<sup>th</sup> Cir. 2004). However, the  
6 Committee fails to present a full recitation of the elements required for a finding of judicial  
7 estoppel, and it is in those elements that the Committee's position is revealed to be flawed.

8           The United States Supreme Court recently listed three factors that  
9 courts may consider in determining whether to apply the doctrine of judicial  
10 estoppel:

11           First, a party's later position must be "clearly inconsistent" with its  
12 earlier position. Second, courts regularly inquire whether the party has  
13 succeeded in persuading a court to accept that party's earlier position, so that  
14 judicial acceptance of an inconsistent position in a later proceeding would  
15 create "the perception that either the first or the second court was misled[.]"  
16 Absent success in a prior proceeding, a party's later inconsistent position  
17 introduces no "risk of inconsistent court determinations," and thus no threat to  
18 judicial integrity. A third consideration is whether the party seeking to assert  
19 an inconsistent position would derive an unfair advantage or impose an unfair  
20 detriment on the opposing party if not estopped. In enumerating these  
21 factors, we do not establish inflexible prerequisites or an exhaustive formula  
22 for determining the applicability of judicial estoppel. Additional considerations  
23 may inform the doctrine's application in specific factual contexts.

24           Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-783 (9<sup>th</sup> Cir. 2001), citing New  
25 Hampshire v. Maine, 121 S. Ct. 1808, 1815 (2001) (internal citations omitted). The  
26 application of judicial estoppel is appropriate to bar litigants from making incompatible  
statements in two different cases. Risetto v. Plumbers & Steamers Local 343, 94 F.3d 597,  
605 (9<sup>th</sup> Cir. 1996).

          The position taken by St. Augustine is not inconsistent with the holding of the cases  
cited by the Committee. In Munns v. Martin, 131 Wn. 2d 192, 196 (1977) (*en banc*), the  
case was actually filed by the individual members of St. Patrick's Parishioners and Friends  
of Historic Preservation. Of the seven members, six were members of the Parish. Id. at  
196. The issue arose when the "St. Patrick Building Committee," a parish committee,  
applied for a demolition permit related to St. Patrick School. This was a case of historic



1 preservation interests vs. parish building committee interests, Parishioner v. Parishioner.  
2 Id. at 194-199. The case holding invalidated a statute that was being used by a non-  
3 parishioner in an attempt to stop a building project advanced by a parish building  
4 committee for the furtherance of the Church's fundamental right to exercise religion. The  
5 ordinance was found to have a coercive effect on the practice of religion.

6 The second case, Miller v. Catholic Bishop of Spokane, 2004 WL 2074328 (Wash.  
7 App. 2004), is an unpublished decision. As a matter of law, this opinion should not have  
8 been cited. "[U]npublished opinions of the Court of Appeals will not be considered in the  
9 Court of Appeals and should not be considered in the trial courts. They do not become a  
10 part of the common law of Washington." State v. Fitzpatrick, 5 Wn. App. 661, 668  
11 (1971)(emphasis added).

12 Regardless, in Miller, the Catholic Bishop of Spokane was sued for damages based  
13 upon the plaintiff's fall from a loft opening. The Bishop defended the action based on its  
14 ownership of the property, which was the Parish Hall of Sacred Heart Catholic Church in  
15 Springdale, Washington. However, this is not a position that is "clearly inconsistent" with  
16 the current position taken by the Diocese and the Parishes. There is no assertion or  
17 indication as to the nature of the Bishop's ownership interest. In this bankruptcy case, the  
18 Diocese and the Parishes assert that the Diocese holds an ownership interest in the  
19 property, but holds that interest in trust for the Parishes. This is not an inconsistent  
20 position. Rather, the ownership status of the Bishop in Miller was never addressed or  
21 litigated. Further, the Bishop did not "succeed in persuading a court to accept that party's  
22 earlier position" because the **nature** of the Bishop's ownership interest was never at issue.  
23 Therefore the current position, which is consistent with the prior position, introduces no risk  
24 of inconsistent court determinations.

## 25 **5. The Committee's Reliance Upon F.E.L. Publication, Ltd. v. The Catholic** 26 **Bishop of Chicago and Oregon Case Law is Misplaced.**

First, both Oregon and Illinois apply a neutral principle of law approach to church  
property issues. When examining church property disputes, Washington applies the more



1 stringent approach of compulsory deference. Furthermore, the legislative histories and  
2 governing statutes concerning corporate soles is much different than that of Washington.

3 F.E.L Publications was a seventh circuit case which decided the issue on the legal  
4 relationship between the Diocese and the Parishes within it in order to resolve a claim  
5 against the diocese for tortious interference with a business relationship. There the Court  
6 held that it was impossible for the cause of action to be based on the Diocese's directives  
7 to the Parishes as those Parishes had no independent status, and were in fact "subsumed  
8 under the Catholic Church." F.E.L., 754 F.2d at 221. In concluding this, the court relied  
9 primarily upon Illinois case law, and in particular Haymes v. Catholic Bishop of Chicago, 41  
10 Ill.2d 336 (1968), Catholic Bishop of Chicago v. Village of Palos Park, 286 Ill. 400 (1919)  
11 and Galich v. Catholic Bishop of Chicago 75 Ill.App.3d 538 (1979). The case primarily  
12 relied upon was Galich, however, that issue was not before the court in Galich.

13 In Galich, the Court held that the statute under which the Bishop of Chicago  
14 incorporated did not create a statutory trust for the benefit of the Parishioners bringing the  
15 case. Further, the Court held that any determination of the ability or inability of the Bishop  
16 to demolish a church would violate the First Amendment.

17 The statute under which the case was decided was subsequently amended. As  
18 amended, it includes a great deal of language indicating a legislative intent to create a trust  
19 for the benefit of the religious congregation for whom the corporation is formed.

20 The other cases relied upon by the F.E.L. Court only support its conclusion by  
21 inference. In Haymes, the Catholic Bishop of Chicago was named the defendant in a slip  
22 and fall case at a Catholic school. While the issue was not addressed by the Court in  
23 Haymes, the implication is that the Catholic school could not have been the proper  
24 defendant. In Village of Palos Park, the Catholic Bishop of Chicago essentially challenged  
25 the validity of a local zoning ordinance precluding the creation of a cemetery in the space  
26 the Catholic Bishop wished to make one. Again, only by the inference that the Catholic  
Bishop was the only party which could have brought the action does this case support the  
conclusion reached by the F.E.L. Court.

1 **B. The Bankruptcy Estate Of The Diocese Does Not Have An Interest In The Real**  
2 **Property At Issue.**

3 The Committee argues in its Complaint and subsequent Motion that by virtue of its  
4 interpretation of law and facts that St. Augustine's real and personal property is property of  
5 the Debtor's bankruptcy estate. However, this argument is not substantiated. Section 541  
6 of the Bankruptcy Code specifically excludes from the estate property to which the Debtor  
7 holds legal title, but has no equitable or beneficial interest. (See 11 U.S.C. § 541(b), (c),  
8 and (d))

9 The concept of trust relationships, bare legal title, and beneficial/equitable ownership  
10 of property is not new to bankruptcy courts. Courts have repeatedly held that when a debtor  
11 holds mere legal title to property and a non-debtor holds the beneficial or equitable  
12 ownership of that property, said property is not property of the estate. See Matter of  
13 Torrez, 63 BR 751, 754-55 (9<sup>th</sup> Cir. BAP 1986)(imposition of resulting trust appropriate  
14 since title was only put in children's name to avoid certain restrictions in a government  
15 program); Sale of Guar. Corp., 220 BR 660, 664 (9<sup>th</sup> Cir. BAP 1998)(where the transferee of  
16 property does not pay the purchase price for the property, the transferee is presumed to  
17 hold the property in a resulting trust for the party who paid the consideration for its  
18 purchase).

19 The standard of inquiry under section of the Bankruptcy Code excluding from  
20 property of the estate trust interests that are subject to transfer restrictions enforceable  
21 under applicable non-bankruptcy law, normally has three parts:

- 22 (1) whether the debtor has a beneficial interest in a trust;
- 23 (2) whether there is a restriction on the transfer of that interest; and
- 24 (3) whether the restriction is enforceable under non-bankruptcy law.

25 In re Wilcox, 233 F.3d 899 (6<sup>th</sup> Cir. 2000)

26 The evaluation of each element is resolved in accordance with and through the  
application of state law. Butner v. United States, 440 U.S. 48, 55, 99 S.Ct. 914, 59 L.Ed.2d  
136, 141-42 (1979).

1 Washington law clearly establishes that the Debtor holds only "bare legal title" to the  
2 property in question. St. Augustine is the true beneficial and equitable ownership of the  
3 real property in dispute.

4 **1. St. Augustine Parish Is The Beneficiary Of A Statutory Trust, Holding All**  
5 **Equitable And Beneficial Interest In The Real Property.**

6 The corporation sole statute in Washington clearly and explicitly creates a statutory  
7 trust comprised of the disputed property held for the benefit of the Church and its  
8 parishioners. RCW Ch. 24.12. The Debtor incorporated under this chapter in 1915.

9 The legislative history is absolutely clear that the statute was enacted to create a  
10 trust relationship. The bill, as introduced in the Senate by two Spokane Senators, was  
entitled:

11 An Act providing for the organization of corporations sole, defining their  
12 powers, authorizing them to transact business and hold property in trust for  
13 religious denominations societies or churches.

14 S.B. 188 (Journal of Senate, 1915, p. 283) (emphasis added). After its introduction,  
15 it was referred to the Senate Committee on Corporations other than Municipal. Id. After  
16 review by the Committee, recommended that the bill be passed the Senate on March 6,  
1915.

17 The bill was subsequently passed by the house on March 10, 1915, and was  
18 approved by the Governor March 15, 1915.

19 The passed Senate Bill 188 became Session Law, Chapter 79. "Organizations and  
20 Powers of Corporations Sole."

21 Section 3 specifically states:

22 . . . Provided, all property held in such official capacity by such bishop,  
23 overseer or presiding elder, as the case may be, shall be in trust for the use,  
purpose, benefit, and behoof of his religious denomination, society or church.

24 S.B. 188 (Session Laws, 1915, Chapter 79, p. 254)

25 As a corporation sole, the Debtor has the power to contract, sue, and be sued in  
26 court. R.C.W. § 24.12.020 (West 2005). A corporation sole also has the power to deal in

1 real and personal property in the same manner as any natural person. Id. This grant of  
2 legal capacity is explicitly for the benefit of the trust created under this chapter. Id. The  
3 trust is comprised of all the property held by the Debtor in its official capacity. RCW §  
24.12.030 (West 2005). Specifically the statutes state:

4       ...All property held in such official capacity by such bishop, overseer or  
5       presiding elder as the case may be, shall be in trust for the use, purpose,  
6       benefit and behoof of his religious denomination, society or church.

7 RCW § 24.12.030 (West 2005).

8       Every corporation sole shall, for the purpose of the trust, have the power to  
9       contract in the same manner and to the same extent as a natural person, and  
10       may sue and be sued, and may defend in all courts and places, in all matters  
11       and proceedings whatever, and shall have authority to borrow money and  
12       give promissory notes therefor, and to secure the payment of the same by  
13       mortgage or other lien upon property, real and personal; ...

14 RCW § 24.12.020 (West 2005)(emphasis added). This statute defines the legal  
15 relationship between the Debtor, St. Augustine, and Parishioners as a relationship of  
16 trustee and beneficiary. See, RCW § 24.12.030 (West 2005). This is also consistent with  
17 the norms of Canon Law which provide that each parish is a Church capable of acquiring  
18 and owning real and personal property interests.

19       Despite this clear statute and governing principles of Canon Law, the Committee  
20 misconstrues Washington case law explicitly recognizing the restrictions existing on  
21 property impressed with a trust by dedication to religious organizations for the benefit of  
22 such organizations. In Wilkeson v. Rector, etc. St. Luke's Parish, 176 Wash. 377, 386  
23 (1943), cited by the Committee, the Court explicitly notes that while the alienation of the  
24 property in that case was within the power of the trustee, the use of the proceeds from the  
25 sale could not be diverted from the benefit of the religious purposes for which the property  
26 was donated. Wilkeson, 176 Wash. at 385. ("In passing, it may be conceded that, if the  
purpose of respondents was to divert the funds to be received from the sale of the property  
to other than religious purposes of the Episcopal Church, the court could and would enjoin  
them. The trustee is merely the holder of the legal title.") Even the court's explicit holding,  
quoted only in part by the Committee, recognizes that courts will ensure that property of a  
trust which is held to benefit a religious society cannot lawfully be diverted from the purpose

1 for which the trust is held. Id. at 386. Specifically, the court stated: "For in a trust of the  
2 character involved here, where no restraint is imposed on the right to alienate, the courts  
3 will not interfere further than to see to it that the proceeds from the sale of the trust property  
4 are not diverted from the use for religious purposes of the faith or denomination to which  
5 the property was dedicated." Id. (emphasis added).

6 Despite the Committee's assertion that "[t]he corporation sole statute's 'trust' for the  
7 Church is no different than the trust in Wilkeson..." (Committee's Memo, p. 11) the  
8 Committee disregards the court's explicit statements upholding restrictions on the use of  
9 the trust res and its proceeds, and identifying that "[t]he trustee is merely the holder of the  
10 legal title." Id. at 385. The Committee's memorandum repeatedly fails to distinguish  
11 between the rights and obligations of a trustee as the legal title holder of property, and the  
12 existence of an equitable interest in the property, attempting instead, to equate the holding  
13 of legal title by the Catholic Bishop of Spokane with the absence of the existence of a trust.  
14 This merely evidences a lack of recognition of the distinction between legal title and an  
15 equitable interest, and does not support the Committee's argument that no trust exists.

16 The Catholic Bishop of Spokane is the trustee of the statutory trust created under  
17 RCW chapter 24.12. Whether or not, as trustee, the Catholic Bishop of Spokane has the  
18 power to alienate certain property of the trust, any such alienation must be for the "benefit  
19 and behoof of his religious denomination, society or church." RCW § 24.12.030 (West  
20 2005). With regard to "proceeds from the sale of the trust property," they "are not to be  
21 diverted from the use for religious purposes of the faith or denomination." Wilkeson, 176  
22 Wash. at 386. The statutory trust under which the property is held reserves the beneficial  
23 use of the property for St. Augustine.

## 22 **2. St. Augustine Is The Beneficiary Of An Express Trust.**

23 The recognition and observance of the civil duties of a trustee have been impressed  
24 upon the Debtor since its incorporation. The Catholic Bishop of Spokane was incorporated  
25 as a corporation sole under the foregoing statute on July 3, 1915. With respect to St.  
26 Augustine Parish, this trust relationship commenced with the formation of the Parish. The  
Washington Supreme Courts has noted that statements in articles of incorporation can be

1 sufficient to create an express trust. Hoffman v. Tieton View Methodist Church, 33 Wn.2d  
2 at 727 (1949) ("There is no question in our minds but that all property acquired by Tieton  
3 View was, under article VIII of its articles of incorporation ... held in trust for the uses of the  
4 Methodist Church...").

5 The articles of incorporation clearly express the intent of creating and maintaining a  
6 trust for the benefit of the members of the Roman Catholic faith. Specifically, the articles  
7 expressly provide:

#### 8 ARTICLE III

9 This corporation is formed for the purpose of transacting business and  
10 **holding property in trust** for that certain religious denomination or society  
11 known as the Roman Catholic Church; to do business and contract in the  
12 same manner and to the same extent as a natural person; to borrow money  
and give promissory notes therefor, and to secure the payment of the same  
by mortgage or other lien upon property real and personal; to buy, sell, lease,  
mortgage, and in every way use and deal in real and personal property and to  
receive bequests for its own use or upon trusts.

#### 13 ARTICLE IV

14 The incorporator of this corporation is Augustine F. Schinner, who is the duly  
15 appointed, qualified and acting Roman Catholic Bishop of the Diocese of  
16 Spokane, in the state of Washington, and who as such Bishop of the Roman  
17 Catholic Church has subscribed these Articles of Incorporation, in order to  
18 become a corporation sole, together with his successors in office by his  
official designation, in the manner prescribe in "An Act Providing for the  
Organization of Corporations Sole, Defining Their Powers, **Authorizing them  
to transact business and hold property in trust for religious  
denominations, societies or churches.**" passed by the Legislature of the  
State of Washington and approved by the Governor, March 15th, 1915.

#### 19 ARTICLE V.

20 This incorporation is a religious corporation, not organized for gain and is  
21 without capital stock, **all property held by it being in trust** for the use,  
purpose, benefit and behoof of the Roman Catholic Church of the Diocese of  
Spokane, in the State of Washington.

22 (Articles of Incorporation, 713115, Emphasis Added)

23 An express trust "arises because of the expressed intent and involves a fiduciary  
24 relationship in which the trustee holds property for the benefit of a third party." Goodman v.  
25 Goodman, 128 Wn.2d 366, 372 (1995). Ninety years ago, the Bishop of Spokane clearly  
26



1 expressed the intent to hold property in trust for the benefit of the Parishes of the Church of  
2 the Diocese of Spokane.

3 A trust will be found to exist if there is a clear manifestation of an intent to create a  
4 trust; and the entire instrument, as well as its general purpose and scope, should be  
5 considered, and the instrument should be construed in light of the circumstances  
6 surrounding its execution. See, Hoffman v. Tieton View Meth. Ch., 33 Wn.2d 717, 726  
(1949).

7 In this case, the trust instrument consists of the deed, which contains explicit  
8 language referencing the fact title is held by a "Corporation Sole." The statute governing  
9 corporation soles, RCW 24.12 et seq., clearly puts others on notice that a trust relationship  
10 exists.

11 Just as use and occupancy of property is sufficient to place others on notice of the  
12 possessor's interest, (Miebach v. Colasurdo, 102 Wn.2d 170, 173, 177 (1984)) and the  
13 failure of a spouse to record an interest in community property does not preclude that  
14 spouse from defending that interest in court, (Campbell v. Sandy, 190 Wash. 528, 531  
15 (1937)), the use, improvement and maintenance by St. Augustine of property recorded in  
16 the name of a corporation sole, places the world on notice of the statutory trust under which  
17 it is held, and identifies the true nature of the Debtor's interest in the property. Cf. In re  
18 Country Club Market, 175 B.R. 1005, 1009 (D. Minn. 1994) (finding a valid statutory trust,  
19 and noting that such a finding creates no burden on creditors "[a]s opposed to contractual  
20 or implied trusts, the statute is public. There is no secret agreement between" the parties.).

21 **1. Statute Of Frauds Does Not Make The Express Trust In This Case**  
22 **Defective.**

23 Generally, the statute of frauds will prevent parol evidence from enforcing the terms  
24 of an oral trust absent fraud or other circumstances. In re Marriage of Lutz, 74 Wn. App.  
25 356, 365 (1994). An exception to the requirement for an express trust over real property is  
26 a situation where a beneficiary of the trust has partially performed in accordance with the  
trust. Diel v. Beekman, 7 Wn. App. 139, 144 (1972), overruled on other grounds, Choplin v.  
Sanders, 100 Wn.2d 853 (1984).



1 The standard for evaluating partial performance is whether the beneficiary, with the  
2 consent of the trustee:

- 3 a. Enters into possession of the land;
- 4 b. Makes improvements to the land, and
- 5 c. Changes position in reliance of the trust.

6 See, Diel at 144-145.

7 As demonstrated in the Statement of Facts in this Memorandum (Section IV), St.  
8 Augustine and its parishioners have held possession of the property to the exclusion of all  
9 others. St. Augustine has made all improvements to the land and maintained the  
10 structures thereon. All donations have been received with the understanding that St.  
11 Augustine improved the real property to fulfill religious tenets of the Parish. Such actions  
12 were taken with the understanding the Church property was property belonging to St.  
13 Augustine.

### 14 **C. The Committee Ignores Statutory Restriction On Institutional Funds.**

15 The Committee's discussion of the administrative dissolution of nonprofit  
16 corporations is wholly irrelevant to the enforceability of the restrictions placed on property  
17 donated to St. Augustine under Washington law. This is not an instance of an  
18 administrative dissolution by the state, but a reorganization under Title 11 of the United  
19 States Code. Further, St. Augustine is subject to the Uniform Management of Institutional  
20 Funds Act, RCW Chapter 24.44, which provides only two methods for the release of a  
21 restriction placed on donations. RCW § 24.44.060.

22 Under Washington law, donations given with restrictions as to their use, to  
23 incorporated or **unincorporated organizations operated for religious**, educational, or  
24 other eleemosynary purposes, can only be used in accordance with the restrictions unless  
25 (1) the donor gives written consent releasing the restriction, or (2) an order is obtained in  
26 Superior Court upon a finding that the restriction is (i) obsolete, (ii) inappropriate, or (iii)  
impracticable. R.C.W. § 24.22.060. Further, the statute requires that the Attorney General  
be given notice and opportunity to be heard on any such matter before the Superior Court  
makes its findings, and expressly retains the application of the judicial doctrine of *cy pres*.

1 Id. Contrary to the claim's of the Committee, Washington's Legislature and Judiciary have  
2 a long and well established tradition of honoring the intention of the donors and benefactors  
3 of religious organizations.

4 The facts of this case demonstrate that the real property at issue was paid for with  
5 donated funds, improved, and maintained with donated funds for the benefit of St.  
6 Augustine.

7 **D. If The Court Concludes That A Statutory Trust Or An Express Trust Does Not**  
8 **Exist, A Resulting Trust Should Be Found In Favor Of St. Augustine.**

9 Even if the statutory and express trusts are found to be ineffective, the acquisition  
10 the property in dispute clearly gives rise to a resulting trust. "It is well settled that where  
11 property is taken in the name of a grantee other than the person advancing the  
12 consideration, the one in whose name title is taken is a resulting trustee for the person who  
13 paid the purchase price, in the absence of proof of a contrary intention." Mading v.  
14 McPhaden, 50 Wn.2d 48, 53 (1957). "That grantee is presumed to hold legal title subject to  
15 the equitable ownership of the person advancing the consideration." Stocker v. Stocker, 74  
16 Wn. App. 1, 6 (1994) (quoting, Thor v. McDearmid, 63 Wn. App. 193, 206 (1991)).  
17 "Similarly, where property is transferred to one person and the purchase price is advanced  
18 by him as a loan to another, a resulting trust arises in the latter's favor." Mading, 50 Wn.2d  
19 at 54. Resulting trusts are equitable in nature, and may be established by parole evidence  
20 of a clear, cogent and convincing nature. Stocker, 74 Wn. App. at 6. As evidenced at  
21 Section IV – Statement of Facts – all acquisitions of real and personal property, all  
22 improvements, and all maintenance of the property was paid for with money directly  
23 traceable to parishioners, for the benefit of Parishioners, with the clear understanding and  
24 intent that it was for the benefit of Parish property. Just as in the case of Matter v. Torrez,  
25 63 BR 751, 754-755 (9<sup>th</sup> Cir. BAP 1986), the imposition of a resulting trust is appropriate  
26 since title was placed in the name of the corporation sole with the understanding it was held  
in trust for St. Augustine. The Bishop never intended to actually own the property or assert  
control over the property or improvements as exclusive owner.

1 **E. If The Diocese Is Forced To Breach Its Fiduciary Duty And Trust Relationship**  
2 **owed to St. Augustine, A Constructive Trust Must Be Imposed.**

3 The facts surrounding the nature of the relationship between the Debtor, St.  
4 Augustine, and the acquisition of the property establish a constructive trust for the benefit of  
5 St. Augustine. "A constructive trust is an equitable remedy which arises when the person  
6 holding title to property has an equitable duty to convey it to another on the grounds that  
7 they would be unjustly enriched if permitted to retain it." Lakewood v. Pierce County, 144  
8 Wn.2d 118, 126 (2001). A constructive trust will be "imposed when there is clear, cogent  
9 and convincing evidence of the basis for impressing the trust." Id. To establish a  
10 constructive trust, a "party must show the trust arose from the relationship of the parties  
11 involved, and that the property justly belongs to that party." Id. at 129. Here, the intent of  
12 the parties was to create valid statutory and express trusts, the beneficial use of the  
13 property was at all times held reserved by and for St. Augustine. Not only is there clear,  
14 cogent and convincing evidence for the imposition of a trust, but for the Court to hold that  
15 the property in dispute belongs to the Debtor would unjustly enrich the Debtor to the  
16 detriment of St. Augustine who has relied on its ownership of the property since the parish  
17 was founded.

16 **F. The Committee's Catch All Argument Of "Alter Ego" Fails As A Matter Of Law**  
17 **And Fact.**

18 The "Alter Ego" theory advanced by the Committee is merely a disguised attempt to  
19 circumvent legal deficiencies in its third claim for relief of substantive consolidation. In this  
20 case, the Committee is asking the Court to rule that St. Augustine is liable for the debts of  
21 the Debtor, a corporation sole, even though St. Augustine is a separate legal entity and is  
22 clearly not a "shareholder" of the Debtor.

23 When Washington Courts invoke "piercing the corporate veil", they have applied the  
24 "doctrine of corporate disregard" based upon two elements:

25 a. "The corporate form must be intentionally used to violate or evade a duty,"  
26 and

1           b.       “Disregard must be necessary and required to prevent unjustified loss to the  
2 injured party.”

3           See, Meisel v. M & N Modern Hydraulic Press Co., 97 Wn.2d 403, 410, 645 P.2d  
4 689 (1982)

5           The first factor requires a showing of abuse of the corporate form, typically involving  
6 fraud, misrepresentation, or other action **by the corporation that harms the creditor and**  
7 **benefits the shareholder.** The second factor requires that the harm must actually occur.  
8 In this case, the Committee has neither plead nor demonstrated any facts to support both  
9 requirements of an “Alter Ego Claim.”

10           The undisputed facts offered by St. Augustine demonstrate a claim of “Alter Ego” is  
11 without merit. (See Statement of Facts, Section IV)

12           **1.     The Committee Attempts To Circumvent Statutory Prohibitions Against**  
13           **Substantive Consolidation Of A Not “Moneyed” Entity.**

14           The Committee’s Complaint, in its third cause of action, seeks a declaratory order for  
15 substantive consolidation “all Diocese Related Entities.” The Committee’s Motion for  
16 Summary Judgment now seeks a declaratory order under a theory of “Alter Ego.” Such a  
17 legal theory is nothing more than a thinly veiled attempt to place St. Augustine and other  
18 non-debtor/non-moneyed religious entities into an involuntary bankruptcy. Relief which is  
19 forbidden by the Code. See, 11 U.S.C. § 303(a) and corresponding legislative history.  
20 House Report No. 95-595, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess 321 (1977).

21           The Bankruptcy Code clearly recognizes that not all debtors are the same. And  
22 while Chapter 11 and its provisions do not generally distinguish between for-profit, non-  
23 profit, and religious organizations for the purposes of reorganization, that is not to say that  
24 a distinction does not exist and should not or cannot be made. For example, under the  
25 Bankruptcy Code non-profit corporations are treated more favorably than for-profit  
26 organizations. See, e.g., 11 U.S.C. § 303(a) (excluding non-profit organizations from  
involuntary bankruptcy); 11 U.S.C. § 1112(c) (forbidding a court from converting a case  
filed by a non-profit from Chapter 11 to Chapter 7 without consent). Congress has  
recognized that religious organizations present unique bankruptcy issues because

1 government regulation of religion implicates First Amendment rights. For example, the  
2 Bankruptcy Code has been modified by Congress to protect free exercise of religion to  
3 prevent a trustee from avoiding a debtor's donation given to a religious or charitable  
4 organization. See Religious Liberty and Charitable Donation Protection Act of 1998, Pub.  
L. No. 105-183, 112 Stat. 517 (1998).

5 Substantive consolidation has no express statutory basis, but rather, is a "product of  
6 judicial gloss." In re Augie/Restiro Bakery Co. Lt., 860 F.2d 515, 518 (2<sup>nd</sup> Cir. 1988).  
7 Substantive consolidation results in pooling the assets of, and claims against, the two  
8 entities, satisfying liabilities from the resultant common fund; eliminating inter company  
9 claims; and combining creditors of the two companies for purposes of voting on  
10 reorganization plans. In re Bonham, 229 F.3d 750, 764 (9<sup>th</sup> Cir. 2000).

11 In the present case, even if the Committee could get around the statutory  
12 prohibitions, the Committee would have to demonstrate 1) that the Committee or its  
13 members dealt with St. Augustine Parish and the Debtor as a single economic unit and did  
14 not rely on the separate credit of each of the entities; or that the operations of the Debtor  
15 and St. Augustine Parish were **excessively** entangled with the Debtor's affairs to the extent  
that consolidation will benefit all creditors. See In re Bonham, 229 F.3d 750, 766 (9<sup>th</sup> Cir.).

16 The newly surfaced "Alter Ego" theory is nothing more than a recognition that  
17 Committee's third cause of action has no application in this case.

18 **G. Subjecting The Parish To Declaratory Relief of this Nature Violates First**  
19 **Amendment Rights Of Free Exercise And The Religious Freedom Restoration**  
20 **Act.**

21 The exercise of religion includes the "right to believe and profess whatever religious  
22 doctrine one desires" and prevents the government from "lendi[ng] its power to one side or  
23 another in controversies over religious authority or dogma." See Smith, 494 U.S. at 877  
24 (citations omitted). To protect the exercise of religion, the Supreme Court has held that if  
25 the government "substantially burdens" a person's exercise of religion, and the government  
26 does not demonstrate that it has a "compelling government interest" to justify the religious  
burden, then the government intrusion into a person's free exercise of religion has been

1 violated. See Sherbert v. Verner, 374 U.S. 398, 406 (1963). However, this Court later  
2 limited Sherbert by holding that “the right of free exercise does not relieve an individual of  
3 the obligation to comply with a ‘valid and neutral law of general applicability . . .’” See  
4 Smith, 494 U.S. at 879 (citations omitted). Public opposition to the Smith holding was  
5 immediate and forceful. Congress enacted the Religious Freedom Restoration Act, 42  
6 U.S.C. § 2000bb-1 (1993)(hereinafter, RFRA), “to restore the compelling interest test as set  
7 forth in Sherbert,” and “to guarantee its application in all cases where free exercise of  
8 religion is substantially burdened,” including cases in which the law at issue was of “general  
9 applicability.” See 42 U.S.C. § 2000bb(b)(1), (2). In Boerne v. Flores, 521 U.S. 507  
10 (1997), the Supreme Court declared RFRA unconstitutional as applied to state actions  
11 because Congress had exceeded the scope of its power under Section 5 of the Fourteenth  
12 Amendment in enacting the law. See Boerne, 521 U.S. at 527 (RFRA “intruded into an  
area reserved by the Constitution to the States”). However, RFRA continues to be  
constitutional as applied to federal law. See infra Part I.B.4.

13 Under RFRA, a neutral law of general applicability is an unconstitutional  
14 infringement of a person’s free exercise rights if the following is true: (1) the law  
15 substantially burdens a person’s exercise of religion; (2) the government cannot justify the  
16 law with a compelling government interest; and (3) there are no less restrictive means of  
furthering the government’s compelling interest. 42 U.S.C. § 2000bb-1(a), (b).

17 Two unique circumstances arise would occur if the Court were to dictate the  
18 ownership and use of Parish property: (1) a religious leader will have been replaced by a  
19 government official as the head of a religious organization, resulting in comprehensive  
20 government surveillance of religion; and (2) a government official will be in an  
21 unprecedented position of decision making power over a church/Parish, a position  
22 traditionally given only to a spiritually mandated leader, the Pastor of the Parish, resulting in  
23 the appearance of government endorsement of religion for the benefit of a creditor’s  
committee.

24 St. Augustine’s economic interests cannot be separated from its spiritual interest –  
25 any economic decision the Court makes regarding use or ownership of property inevitably  
26 has direct and significant religious consequences. Thus, the Court will become hopelessly



1 entangled with religious policy of the Catholic Church. The effect of St. Augustine's spiritual  
2 mission is that every financial decision it makes is driven by religious objectives toward  
3 religious ends in accordance with Canon Law. This creates an irreconcilable church versus  
4 state conflict between a non-debtor, a creditors committee, and the Court. By effectively  
5 forcing a Parish into bankruptcy by way of declaratory relief, the government is changing  
6 the essential structure of St. Augustine under Canon Law. Since the Canon directs the  
7 religious vision and thus the financial objectives of St. Augustine, such a change would  
8 essentially allow government to determine who benefits from St. Augustine's mission.

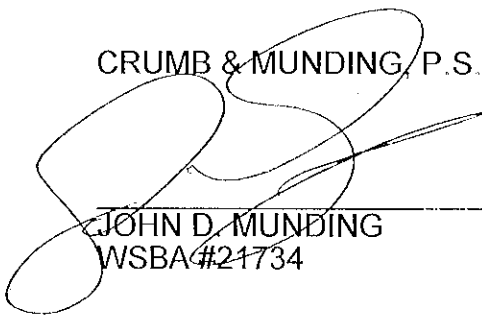
9 **VII.**

10 **CONCLUSION**

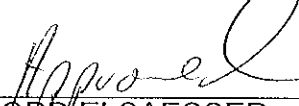
11 As a matter of law, the Committee has not established a case in controversy with St.  
12 Augustine that would permit the declaratory relief requested. Even if the Court were to  
13 consider the pending motion for summary judgment based upon the Committee's factual  
14 theory, the Committee's motion fails as the Committee has failed to eliminate material  
15 questions of fact as to St. Augustine's ownership interest in the real property, including  
16 furnishing all consideration for purchase, improvements, and maintenance.

17 DATED this 25<sup>th</sup> day of May, 2005.

18 CRUMB & MUNDING, P.S.

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ST. AUGUSTINE PARISH'S OPPOSITION  
TO SUMMARY JUDGMENT - 29

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